SOUTHERN DISTRIC				
DERRICK BOSTIC,		X :		
	Petitioner,	:	07 Civ. 453	(PAC) (THK)
- against -		:	<u>ORDER</u>	
JAMES BERBARY,		: :		
	Respondent.	:		
		X		

HONORABLE PAUL A. CROTTY, United States District Judge:

Pro se Petitioner Derrick Bostic seeks a writ of habeas corpus from his conviction on June 9, 2004, after a jury trial in Supreme Court, New York County. The jury convicted Bostic of two counts of Criminal Sale of a Controlled Substance In or Near School Grounds (N.Y. Penal Law § 220.44), two counts of Criminal Sale of a Controlled Substance in the Third Degree (N.Y. Penal Law § 220.39), Criminal Possession of a Controlled Substance in the Third Degree (N.Y. Penal Law § 220.16), and Criminal Possession of a Controlled Substance in the Fifth Degree (N.Y. Penal Law § 220.06). The court sentenced Bostic to concurrent prison terms of six to twelve years and an additional concurrent term of three and one-half to seven years for the fifth degree possession conviction. In his Petition for a Writ of Habeas Corpus, Petitioner pleads two grounds for relief, both claiming a violation of his due process right to a fair trial. First, Petitioner claims that the prosecutor committed prosecutorial misconduct during summation by improperly vouching for police officers who were witnesses in the trial and by making prejudicial statements about the Defendant-Petitioner. Second, Petitioner

claims that the trial judge improperly aided the prosecution's case by asking Petitioner questions that revealed judicial skepticism about Petitioner's testimony.

The matter was referred by this Court to United States Magistrate Judge Theodore H. Katz, who issued his Report and Recommendation ("R&R") on December 4, 2007, recommending that Petitioner's request for habeas relief be denied and that the action be dismissed with prejudice. The Magistrate Judge provided ten days for written objections, pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b), and specifically advised that the failure to file objections "will result in a waiver of those objections for purposes of appeal." (R&R 29). No objections have been filed.

DISCUSSION

"To accept the report and recommendation of a magistrate, to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record." Wilds v. United Parcel Serv., 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003). Upon review and analysis, the Court finds no clear error in Magistrate Judge Katz's determinations that:

- 1) Petitioner's claim of improper questioning by the trial judge is procedurally barred from federal habeas review because the New York Appellate Division concluded that defense counsel failed to preserve the objection. Thus, the Appellate Division's decision is an adequate and independent state procedural bar to federal habeas review.
- 2) Petitioner's claim of prosecutorial misconduct—that the prosecutor improperly vouched for the credibility of the State's witnesses—is both procedurally barred by an adequate and independent state procedural rule and is wrong on the merits.

3) The prosecutor's comments about Petitioner during summation did not violate the Petitioner's right to a fair trial, and, even if they were improper, were not so severe as to undermine the fairness of the trial.

Accordingly, the Court accepts and adopts the Report and Recommendation as its opinion, and Petitioner's habeas petition is DENIED. Pursuant to 28 U.S.C. § 1915(a)(3), I find that any appeal from this order would not be taken in good faith. Petitioner did not file objections to the Report and Recommendation, as he was required to do in order to preserve his right to appeal.

The Clerk of the Court is directed to enter an Order closing this case.

Dated: New York, New York August 19, 2008

SO ORDERED

United States District Judge

Copies Mailed To:

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